LIBRARY
SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 227

CITY OF AUDUBON PARK, KENTUCKY and BOARD OF TRUSTEES, GEORGE W. STEBBINS, H. PATTERSON POPE, MRS. CLARENCE L. HENDERSON, THEODORE H. ARENHOFF and DR. BURTON M. HEINE, Petitioners,

—Against—

AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., EASTERN AIR LINES, INC., and TRANS WORLD AIRLINES, INC., Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WILSON W. WYATT,
WYATT, GRAFTON & SLOSS,
Marion E. Taylor Building,
Louisville, Kentucky 40202
Counsel for Respondents.

STUART R. LAPP,
JAMES H. WILLIAMS, JR.,
Of Counsel.

July 8, 1959

INDEX TO BRIEF.

	PAGE
INDEX TO APPENDIX	iii–iv
TABLE OF AUTHORITIES	v–vi
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS	2
COUNTER-STATEMENT OF QUESTIONS PRESENTED	2– 3
COUNTER-STATEMENT OF THE CASE	3– 4
COMMENT ON STATEMENT OF THE CASE IN THE PETITION	5– 6
ARGUMENT	6–25
I. There Is No Conflict Between the Lower Court Decision and the Decisions of This Court	6
II. There Is No Conflict of Decisions Among the Courts of Appeals	7– 8
III. There Is No Important Novel Question of Federal Law Which Should be Decided by This Court	9–25
A. The Ordinance Clearly Violates the Constitution	9–16
1. There is a Direct Conflict Between the Ordinance and the Federal Statutes and Regulations	9–11

PAGE

2. The Congress Has Preempted the Regulation of Navigable Airspace and of Air Traffic Therein. 11–14

3. The Ordinance is an Intolerable and Undue Burden on Interstate Commerce. . . . 15–16

B. This is Not a "Taking" Case. 16–20

1. The Only Issue is Whether the Ordinance is Valid; Rights of Landowners are Not Involved. 16–17

2. The Pleadings Do Not Allege a "Taking" of Property. 18

3. For a "Taking" Case We Have the Wrong Parties—Both Plaintiffs and Defendants. 18–19

4. If Audubon Park Has Any Complaint Relative to FAA Regulations, It Must First Exhaust Its Administrative Remedy. 19–20

C. It is Inappropriate For the Court to Render an Advisory Opinion to Audubon Park as to Powers of Its Board of Trustees Relative to Enactment of Future Ordinances. 20–21

D. The District Court Appropriately Entered Summary Judgment. 21–25

CONCLUSION 25–26

APPENDIX (Separate Volume) 1b–37b

INDEX TO APPENDIX.

	PAGE
Findings of Fact and Conclusions of Law	1b–9b
United States Constitution	
Commerce Clause, Art. I, § 8, Cl. 3	9b
Supremacy Clause, Art. VI, Par. 2	9b
Courts of Appeals; Certiorari 28 USC § 1254	9b
Judiciary and Judicial Procedure Act	10b–12b
28 USC § 1331	10b
28 USC § 1332	10b–11b
28 USC § 1337	11b
28 USC § 2201	11b–12b
28 USC § 2202	12b
Federal Aviation Act of 1958	12b–15b
49 USC § 1301(24)	12b
49 USC § 1303	12b–13b
49 USC § 1304	13b
49 USC § 1348	13b–14b
49 USC § 1486	14b–15b
49 USC § 1508	15b
Federal Aviation Regulations	16b–32b
14 CFR § 1.1	16b
14 CFR § 11.75	16b
14 CFR § 71.11	16b–17b
14 CFR § 71.171	17b
14 CFR § 77.13	17b–18b
Diagrams Illustrating 14 CFR § 77.13	19b–20b
14 CFR § 77.23	21b
Diagram Illustrating 14 CFR § 77.23	22b
14 CFR § 77.27	23b–24b
Diagram Illustrating 14 CFR § 77.27	25b
14 CFR § 91.75	26b

PAGE

14 CFR § 91.87 ..... 26b–27b
14 CFR § 91.115 ..... 28b
14 CFR § 91.117 ..... 28b
14 CFR § 97.17 ..... 29b
Eastern Air Lines Approach Chart for Runway 19 ..... 30b
14 CFR § 121.133 ..... 31b

Ordinance No. 4 Series 1967, City of Audubon Park, Kentucky 31b–32b

Certified Copy of Judgment Incorporating the City of Audubon Park 33b–36b

Julliard Exhibit "A" 37b–38b

TABLE OF AUTHORITIES.

Cases:

	PAGE
All American Airways, Inc. v. *Village of Cedarhurst,* 106 F. Supp. 521 (E.D.N.Y., 1952), *aff'd* 201 F. 2d 273 (2d Cir., 1953); 111 F. Supp. 677 (E.D.N.Y., 1953), *aff'd* as *All American Airways, Inc.* v. *Elderd, Mayor,* 209 F. 2d 247 (2d Cir., 1954); *Allegheny Airlines, Inc.* v. *Village of Cedarhurst,* 132 F. Supp. 871 (E.D.N.Y., 1955), *aff'd* 283 F. 2d 812 (2d Cir., 1956)	7
American Airlines, Inc. v. *Town of Hempstead,* 272 F. Supp. 226 (E.D.N.Y., 1967), *aff'd* 398 F. 2d 369 (2d Cir., 1968), *cert. denied,* ____ U. S. ____, 89 S. Ct. 620, 21 L. Ed. 2d 561 (1969)	8, 16–17
Chicago & S Airlines v. *Waterman S.S. Corporation,* 333 U. S. 103, 68 S. Ct. 431, 92 L. Ed. 568 (1948)	20
F.A.R. Liquidating Corp. v. *Brownell,* 209 F. 2d 375 (3rd Cir., 1954)	23
Griggs v. *Allegheny County,* 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962)	17, 18
Hurley v. *Kincaid,* 285 U. S. 95, 52 S. Ct. 267, 76 L. Ed. 637 (1932)	17
International L. & W. Union v. *Boyd,* 347 U. S. 222, 74 S. Ct. 447, 98 L. Ed. 650 (1954)	21
Mercer County, et al. v. *Ballinger,* 238 Ky. 120, 36 S. W. 2d 856 (1931)	17
Southern Pacific Company v. *Arizona,* 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945)	15–16
United States v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946)	18

Statutes:

28 USC § 1331	2
28 USC § 1332	2
28 USC § 1337	2
28 USC § 2201	2

PAGE

49 USC § 1301(24). 2, 3, 9–10
49 USC § 1303. 3
49 USC § 1304. . . . . 3, 9
49 USC § 1348. . . . . 3, 10
49 USC § 1486. 20
49 USC § 1508. 12

Regulations:

14 CFR § 1.1. 13
14 CFR § 11.75. 19
14 CFR § 71.11. 13
14 CFR § 71.171. 13
14 CFR § 77.13. 13
14 CFR § 77.23. 13
14 CFR § 91.75(b). 10
14 CFR § 91.87(b). 10
14 CFR § 91.87(d). 10
14 CFR § 91.115 10
14 CFR § 91.117(b). 10

Miscellaneous:

Federal Rules of Civil Procedure, Rule 56. 23
H. Rep. No. 2360, 85th Cong., 2d Sess. (1958). 14
Moore's Federal Practice, Vol. 6, § 56.11 [3], p. 2164. 23
S. Rep. No. 1811, 85th Cong., 2d Sess. (1958). 14
U. S. Constitution, Commerce Clause. 15
U. S. Constitution, Supremacy Clause. 18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 227

CITY OF AUDUBON PARK, ET AL., - *Petitioners,*

—AGAINST—

AMERICAN AIRLINES, INC.,
DELTA AIR LINES, INC.,
EASTERN AIR LINES, INC., and
TRANS WORLD AIRLINES, INC., - - *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

May it please the Court:

OPINIONS BELOW.

The Opinion of the United States Court of Appeals for the Sixth Circuit, printed in Petitioners' Appendix at p. 23 is reported at 407 F. 2d 1306 (Mar. 1969). The Findings of Fact and Conclusions of Law of the United States District Court for the Western District of Kentucky (Brooks, J.) are reported at 297 F. Supp. 207 (Apr. 1968) and are reprinted at p. 1b of the Appendix hereto.

JURISDICTION.

The Petitioners have invoked the authority of this Court under 28 U.S.C. § 1254(1). The jurisdiction of the Federal District Court was based on 28 U.S.C. §§ 1337, 1331, 1332 and 2201 *et seq.*

Respondents received copies of the Petition by mail on June 6, 1969.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS.

In addition to the provisions of the Federal Aviation Act of 1958, as amended (49 U.S.C. § 1301, *et seq.*), this case involves Federal Aviation regulations adopted pursuant to said Act, and also involves constitutional provisions and Ordinance No. 4 Series 1967 of the City of Audubon Park. The ordinance, constitutional provisions, pertinent sections of the statutes, and pertinent regulations are all reproduced in the Appendix hereto.

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

Although Petitioners list ten separate questions to be presented, these ten questions may be condensed into the following:

1. Is the Ordinance by which Audubon Park attempted to prohibit flight in the airspace above it at an altitude less than 750 feet constitutional?
2. Is this a "taking" case?
3. Should the Court refrain from giving advisory opinions to Audubon Park as to powers of its

Board of Trustees relative to enactment of future ordinances?

4. Was it appropriate for the Court to enter summary judgment?

COUNTER-STATEMENT OF THE CASE.

The Findings of Fact[1] of the District Judge constitute a fair, adequate, and well-stated recitation of the facts pertinent to this controversy. Counsel for Petitioners has not challenged the Findings of Fact.

The City of Audubon Park (hereinafter "Audubon Park") is located to the north of Standiford Field and lies astride the extended center line of Runway 19, its nearest city limit being 4800 feet from the end of the runway and its most distant limit being 8000 feet from the end of the runway. (See diagram presented to the District Court as Julliard Exhibit "A" (R. App. 37b). An aircraft approaching to land on Runway 19 necessarily uses the airspace over Audubon Park (Finding of Fact 3, R. App. 2b).

The Respondents (hereinafter sometimes "the Airlines") are all engaged as common carriers in the interstate transportation of passengers, property, and United States mail to and from Standiford Field (Finding of Fact 2, R. App. 2b).

Pursuant to 49 U.S.C. §§ 1301, 1303, 1304, 1348(a) and 1348(c) (to be cited in the Argument herein) the Federal Aviation Administration (hereinafter

[1] *American Airlines, Inc.* v. *City of Audubon Park*, 297 F. Supp. 207 found in Appendix to this brief beginning at p. 1b. This Appendix will be referred to as R. App. Petitioners' Appendix will be referred to as P. App.

"FAA") of the United States Department of Transportation has adopted various regulations[2] which control the use of the airspace above Audubon Park and the operation of aircraft therein.

On the 20th of November, 1967, the Board of Trustees of Audubon Park enacted its Ordinance No. 4, Series 1967 (hereinafter "The Ordinance," R. App. 31b), by which it declared that it was unlawful for any person, corporation, or other entity to operate an aircraft at a height of less than 750 feet in the airspace over Audubon Park. The ordinance provided for a fine of $100 for each offense. The officials of Audubon Park announced their intention vigorously to enforce the Ordinance and to institute criminal proceedings against the Airlines in the event of any flights lower than said elevation of 750 feet (Finding of Fact 4, R. App. 3b).

Because of the threat by Audubon Park, the Airlines were forced to bring this action to obtain injunctive relief from the effects of its unconstitutional provisions. The FAA regulations authorize and require Respondents' aircraft to fly over Audubon Park at an elevation between 442 feet and 282 feet above ground level; the Ordinance prohibits flight below 750 feet. The Airlines simply cannot comply with both (Finding of Fact 17, R. App. 6b).

---

[2]Beginning at R. App. 16b are the various regulations referred to, and supporting charts and maps.

COMMENT ON STATEMENT OF THE CASE IN THE PETITION.

It is appropriate to comment briefly on certain statements of fact in the Petition which are wholly unsupported in the record. Counsel for Petitioners refers to "health and safety hazards," "wining and dining, inspections and some promised relief," "one year of intensive study and meeting with Air Board Authorities" (pp. 4-5 of Petition). There is nothing in the record to support these statements.

Counsel for Petitioners inaccurately assert that the Airlines claim the right to fly aircraft as low as 84 feet at the city's boundary closest to the airport. The 84-foot elevation at that point is one above which FAA seeks to control construction of improvements on land, so that no obstruction may protrude above such elevation. It is not an elevation at which Airlines claim the right to fly.

There is also nothing in the record to support the statement on p. 4 of the Petition that the City of Audubon Park was established in 1908, thus making it appear that the City was incorporated long before the development of Standiford Field. Since Petitioners' counsel make this assertion Respondents have examined the public records only to learn that Audubon Park was first incorporated as a Sixth Class City in Kentucky on April 18, 1941. (See certified copy of Judgment incorporating Audubon Park at R. App. 33b).

Counsel goes on to assert that Petitioners "will offer proof that flights are regularly made at" lower altitudes than 145 and 84 feet above Audubon Park. Not a word in the record supports these assertions. These assertions can only be made to confuse the one clear-cut issue in this case:

Is the Ordinance valid?

ARGUMENT.

Audubon Park has failed to state specifically any of the grounds set forth in Rule 19 of this Court upon which a writ of certiorari may be granted. The only grounds that could have any relevancy to the issues involved may be paraphrased as follows:

I. A conflict between the lower court decision and the decisions of this Court.

II. A conflict of decisions among the Courts of Appeals.

III. The Court of Appeals below decided an important novel question of federal law which should be decided by this Court.

I.

THERE IS NO CONFLICT BETWEEN THE LOWER COURT DECISION AND THE DECISIONS OF THIS COURT.

Audubon Park does not contend that there is any conflict between the decision of the Sixth Circuit Court of Appeals and any of the decisions of this Court. The reason is clear: no such conflict exists.

II.

THERE IS NO CONFLICT OF DECISIONS AMONG THE COURTS OF APPEALS.

The only other Court of Appeals to consider the questions presented in this controversy has been the Court of Appeals for the Second Circuit which, in two different opinions, reached the same result as did the Court of Appeals for the Sixth Circuit in this case.

In 1956, the Court of Appeals for the Second Circuit in *Allegheny Airlines, Inc., et al.* v. *Village of Cedarhurst, et al.*, 238 F. 2d 812 (2d Cir., 1956)[3] considered an ordinance of the Village of Cedarhurst, which prohibited flight by aircraft over that village at elevations of less than 1000 feet.

The then Civil Aeronautics Board had established landing procedures which required aircraft to fly over Cedarhurst at altitudes below 1000 feet.

The Court held without equivocation that the Congress had preempted the field and that the Ordinance was invalid. No writ of certiorari was sought in the *Cedarhurst* case.

In 1964, the Town of Hempstead, New York, enacted an ordinance which prohibited the creation of noise exceeding certain specified levels of intensity.

---

[3]This controversy was the subject matter of six reported opinions; the five earlier ones were *All American Airways, Inc.* v. *Village of Cedarhurst*, 106 F. Supp. 521 (EDNY, 1952); *All American Airways, Inc.* v. *Village of Cedarhurst*, 201 F. 2d 273 (2d Cir., 1953); *All American Airways, Inc.* v. *Village of Cedarhust*, 111 F. Supp. 677 (EDNY, 1953); *All American Airways, Inc.* v. *Elderd, Mayor*, 209 F. 2d 247 (2d Cir., 1954); and *Allegheny Airlines, Inc.* v. *Village of Cedarhust*, 132 F. Supp. 871 (EDNY, 1955). References hereinafter to the *Cedarhurst* opinion shall relate to the sixth and last opinion reported at 238 F. 2d 812.

Jet aircraft could not use the airspace necessary to land on certain runways at nearby Kennedy Airport without creating the noise prohibited by that ordinance. Various airlines challenged the validity of the ordinance in the District Court for the Eastern District of New York. The District Judge, in an opinion reported as *American Airlines, Inc.* v. *Town of Hempstead,* 272 F. Supp. 226 (EDNY, 1967), held:

(1) That the ordinance was an unconstitutional burden on interstate commerce;

(2) That the area in which the ordinance operated had been preempted by federal legislation and regulation; and

(3) That the ordinance was in direct conflict with valid applicable federal regulations.

In an opinion styled *American Airlines Inc.* v. *Town of Hempstead,* 398 F. 2d 369 (1968), the United States Court of Appeals for the Second Circuit affirmed. Relying on its earlier opinion in *Cedarhurst,* the Court held the *Hempstead* ordinance to be invalid "for in effect there is square conflict between the local ordinance and federal regulation in each case." 398 F. 2d 375, 376.

A writ of certiorari was sought in the *Hempstead* case, but denied —— U. S. ——, 89 S. Ct. 620, 21 L. Ed. 2d 561.

Cedarhurst and *Hempstead* are so squarely in point, that, based upon those precedents alone, the writ of certiorari should be denied. We will, however, proceed further to demonstrate the soundness of the results in those cases.

III.

THERE IS NO IMPORTANT NOVEL QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

A.

The Ordinance Clearly Violates the Constitution.

For the following reasons the ordinance is in direct conflict with provisions of the U. S. Constitution:

1. There is a direct conflict between it and applicable valid federal regulations.
2. The area in which the ordinance attempts to operate has been preempted by federal legislation and federal regulation.
3. The ordinance is an intolerable and undue burden on interstate commerce.

1. THERE IS A DIRECT CONFLICT BETWEEN THE ORDINANCE AND THE FEDERAL STATUTES AND REGULATIONS.

Article VI of the Constitution provides that the laws of the United States "shall be the supreme law of the land." Local statutes or ordinances which are in conflict are invalid.

Congress has provided in 49 U.S.C. § 1304:

> "There is recognized and declared to exist in behalf of any citizen of the United States *a public right of freedom of transit through the navigable airspace of the United States.*" (Emphasis added.)

"Navigable airspace" is defined in 49 U.S.C. § 1301 (24):

> "'Navigable airspace' means *airspace above the minimum altitudes of flight prescribed by regulations* issued under this chapter, *and shall include airspace needed to insure safety in take-off and landing of aircraft.*" (Emphasis added.)

49 U.S.C. § 1348(a) grants to the Administrator of the FAA the authority "to develop plans for and formulate policies with respect to the use of the navigable airspace; and assign by rule, regulations, or order the use of the navigable airspace . . ."

The administrator is given authority under § 1348 (c) "to prescribe air traffic rules and regulations governing the flight of aircraft. . . ."

Pursuant to these powers the Administrator has adopted comprehensive and thorough regulations.[4]

A pilot approaching Runway 19 as he flies in the air above Audubon Park has no choice. He must be in contact with the FAA's Air Traffic Control personnel in the control tower at Standiford Field, 14 CFR § 91.87(b) (R. App. 27b). He must follow the instructions of that control tower, 14 CFR §§ 91.75(b) and 91.115, (R. App. 26b-28b). As he descends to an altitude of 400 feet, which point is directly over Audubon Park, if he cannot see Runway 19 or its approach lights, he must abort his approach and execute a "missed approach procedure," (14 CFR § 91.87(d)(3) 14 CFR § 91.117, R. App. 28b; see Julliard Exhibit "A," R. App. 37b). He is directed by FAA regulations to use an approach slope which, subject to bracketing

[4] All cited regulations are reproduced in full in Respondents' Appendix.

maneuvers, brings him in at an elevation of 442 feet at the distant city limits of Audubon Park and at an elevation of 282 feet at the near boundary of the City (Finding of Fact 11, R. App. 5b). His bracketing maneuvers conceivably could bring him in at a lower elevation, but in no event lower than the approach clearance surface shown as line E on Julliard Exhibit "A," (R. App. 37b). This approach clearance surface is at a 259-foot elevation at the far limit of Audubon Park, and a 160-foot elevation at the near limit.

It is patently obvious that a pilot *cannot follow the federal regulations* adopted pursuant to Congressional action *and also comply with the provisions of the Ordinance* of Audubon Park.

The District Court expressly so held in its Findings of Fact 17 (R. App. 6b), in the following clear language:

> "Pilots operating the aircraft of plaintiffs cannot comply with the FAA regulations and also comply with the provisions of the ordinance of the City of Audubon Park."

The federal law and regulation must prevail.

2. THE CONGRESS HAS PREEMPTED THE REGULATION OF NAVIGABLE AIRSPACE AND OF AIR TRAFFIC THEREIN.

Although, as was decided in *Hempstead,* the fact that the ordinance conflicts with federal law and regulations is alone sufficient to invalidate it, the scope of the federal statutes and regulations so encompasses the field that the principle of federal preemption also

applies. Preemption, of course, is not a new doctrine in the law and considered alone cannot constitute an important novel issue which should be decided by the Court.

There may be some remnant in the broad area of aviation law which the states and local governments may still regulate. When, however, it comes to the manner in which aircraft may use the navigable airspace necessary for a safe landing at an airport with a control tower manned by FAA personnel, that field of regulation has been fully occupied by federal law.

Can there be any stronger language than that contained in 49 U.S.C. § 1508:

> "The United States of America is declared to possess and exercise *complete and exclusive national sovereignty in the airspace of the United States.* . . ." (Emphasis added.)

We have already shown that pilots are specifically authorized and directed by FAA regulation to descend to 400 feet over Audubon Park and at that elevation, when indicated, execute missed approach procedures. We have pointed out that aircraft are authorized and directed to approach Runway 19 on a pre-determined glide slope at elevations in conflict with the ordinance.

FAA has entered the field of protecting the navigable airspace to an even greater extent. Part 77 of the regulations deals with "objects affecting navigable airspace," (R. App. 17b-25b). Part 77 requires prior notice to the Administrator of the FAA of any con-

struction or alteration which penetrates above certain altitudes, depicted on Julliard Exhibit "A" (R. App. 37b).[5] Thus for the purpose of preventing obstructions from protruding upward into the navigable airspace, FAA has adopted regulations relative to elevations as low as 100 feet above ground level and even to lower elevations at the immediate approach to a runway. See also 14 CFR §§ 1.1, 71.11, 71.171 (R. App. 16b, 17b).

The District Court (in Conclusion of Law 11, R. App. 8b) held:

> "The statutes enacted by the Congress clearly expressed an intent fully to preempt the field of law and regulation of interstate and foreign air traffic. The City of Audubon Park, therefore, has no power to enact Ordinance No. 4, Series 1967."

The comprehensiveness of the federal regulatory scheme putting into effect the Congressional intent is so extensive in and of itself as to preempt the field completely from local regulation. The comprehensive nature of the scheme, however, is not the sole basis for inferring an intent to preempt the field. Legislative history clearly supports the conclusion that Congress has expressly preempted the regulation of airspace use and air travel above Audubon Park. The Senate committee report reads:

---

[5]Different sections of Part 77 define different altitudes above which notice must be given. Three of these sections establish altitudes less than 750 feet over Audubon Park. The provisions of 14 CFR § 77.13 are depicted as line A on Julliard Exhibit "A." The provisions of 14 CFR § 77.23(a)(3) are depicted as line B on Julliard Exhibit "A." The provisions of 14 CFR § 77.23(a)(8) are depicted as line C on Julliard Exhibit "A."

> "The present legislation proposes to clear away this ambiguity [caused by scattered responsibility] once and for all by *vesting unquestionable authority for all aspects of airspace management in the Administrator* of the new Agency" [S. Rep. No. 1811, 85th Cong., 2d Sess., p. 14 (1958)]. (Emphasis added.)

In the House Report it is stated:

> "Clearly an *agency* is needed now to develop a sound *national policy* regarding use of navigable airspace *by all users*—civil and military" [H. Rep. No. 2360, 85th Cong., 2d Sess., p. 4; 1958, U. S. Cong. & Adm. News 3744]. (Emphasis added.)

The principle of federal preemption and supremacy of federal law over state law is not a new doctrine. If there ever was a field in which federal preemption is needed, it is that dealing with navigable airspace. How many hundreds, even thousands, of small and large municipalities border upon, or are close to, the nation's airports? During landing and take-off, aircraft pass over these many different municipalities in such a short time it would be impossible for pilots to know, or even knowing, to comply with, differing regulations of the various municipalities. It is imperative that pilots not be distracted by a multiplicity of authority. Uniform procedures are absolutely essential for the safety of aircraft and their passengers.

To permit each municipality to make its own regulation would result in a chaotic plethora of differing regulations that could not possibly be followed.

3. THE ORDINANCE IS AN INTOLERABLE AND UNDUE BURDEN ON INTERSTATE COMMERCE.

Although either the principle of federal preemption or the direct conflict with federal regulation is adequate to establish the invalidity of the Ordinance, the District Court and the Sixth Circuit Court of Appeals found that it is also unconstitutional because it conflicts with the Commerce Clause, which assures freedom of commerce among the states. It can hardly be contended that this a novel question of federal law. See *Southern Pacific Company* v. *Arizona,* 325 U. S. 761, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945).

The District Court found the Ordinance to be "an intolerable and undue burden upon interstate and foreign commerce" (Conclusion of Law 9; R. App. 8b), and further concluded:

> "Under the Commerce Clause (Art. I, § 8, Cl. 3) of the United States Constitution, the City of Audubon Park has no power to regulate interstate and foreign air traffic in the manner set forth in said ordinance" (Conclusion of Law 9, R. App. 4b).

The Sixth Circuit Court of Appeals affirmed the District Court's Findings of Fact and Conclusions of Law *in toto* (P. App. 25).

The Ordinance is not saved by asserting that it is merely an exercise of the inherent police power held by state and local governments. This Court made this clear in the *Southern Pacific* case, saying at 325 U. S. 779, 780:

"The principle that, without controlling Congressional action, a state may not regulate interstate commerce so as substantially to effect its flow or deprive it of needed uniformity in its regulation is not to be avoided by 'simply invoking the convenient apologetics of the police power.' *Kansas Southern R. Co.* v. *Kaw Valley Drainage Dist., supra* (233 U. S. 79, 58 L. Ed. 859, 34 S. Ct. 564.)"

Audubon Park's Ordinance not only substantially restricts the flow of interstate and foreign commerce, but also undertakes to regulate an area which, by its nature, requires uniform, centralized regulation. It, therefore, clearly violates the Commerce Clause of the Constitution.

B.

This Is Not a "Taking" Case.

1. THE ONLY ISSUE IS WHETHER THE ORDINANCE IS VALID; RIGHTS OF LANDOWNERS ARE NOT INVOLVED.

By tedious reasoning counsel for Petitioners asserts that there has somehow been a "taking" of property from unnamed property owners by an unnamed taker, although no facts concerning such an issue were pleaded or proved.

In his Conclusion of Law 4 (R. App. 7b), the District Judge held clearly:

"This is not a 'taking' case."

In the *Hempstead* case, the Court at 398 F. 2d 372, had this to say:

> "Before considering the grounds advanced by the District Court for the conclusion that the ordinance is invalid, we may point out that *this case has nothing to do with questions of landowners' rights to compensation for overflights of their land which amount to a 'taking' of their property.* [See *United States* v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946), and *Griggs* v. *Allegheny County,* 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 585 (1962)]. *All that is involved is the validity of the ordinance.*" (Emphasis added.)

In this action by the Airlines against the City of Audubon Park and its officials, one question, and one question only, has been properly raised: Is the Audubon Park Ordinance valid or invalid?

Even if we indulge in the unfounded assumption that there has been a "taking," the United States Constitution would require compensation therefor, but not in advance of the "taking." In the case of *Hurley* v. *Kincaid,* 285 U. S. 95, 104, 52 S. Ct. 267, 76 L. Ed. 637 (1932), this Court stated, "The 5th Amendment does not entitle him [the complainant] to be paid in advance of the taking."

The Kentucky Court of Appeals has uniformly held that where there is a "taking" in advance of compensation the aggrieved landowner has a cause of action in the nature of a "reverse condemnation" to recover the same measure of damages he would have obtained in a condemnation proceeding. *Mercer County, et al.* v. *Ballinger,* 238 Ky. 120, 36 S. W. 2d 856 (1931), cases therein cited, and numerous other cases.

2. THE PLEADINGS DO NOT ALLEGE A "TAKING" OF PROPERTY.

There is no allegation in the record that either the property of any named landowner, or any specific property of Audubon Park itself, has been taken.

In *United States* v. *Causby,* 328 U. S. 256, 66 S. Ct. 1062, 90 L. ed. 1206 (1946), the Supreme Court held as follows:

> "Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." 328 U. S. 266

No cause of action has been alleged setting forth such low and frequent overflights as to constitute a direct and immediate interference with the use and enjoyment of any specific piece of land, of any particular person or any particular entity.

3. FOR A "TAKING" CASE WE HAVE THE WRONG PARTIES—BOTH PLAINTIFFS AND DEFENDANTS.

When the question of "taking" was raised in *Griggs* v. *Allegheny County,* 369 U. S. 84, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962), the airport was owned by a municipality and the aircraft were owned by certain privately owned airlines. The Court was required to decide *who* had "taken" air easements: the airport, the airlines, or the C.A.A., acting as an authorized representative of the United States. The Supreme Court specifically held:

> "It is argued that though there was a 'taking,' someone other than respondent was the taker—the

> airlines or the C.A.A. acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitiutional sense." 369 U. S. 89

Standiford Field is operated by the Louisville and Jefferson County Air Board. That Board is not a party to this action.

Respondents' aircraft use Standiford Field entirely in accordance with FAA regulations. Audubon Park seems to be seeking judicial review of these regulations. Yet the FAA is not a party to this action.

4. IF AUDUBON PARK HAS ANY COMPLAINT RELATIVE TO FAA REGULATIONS, IT MUST FIRST EXHAUST ITS ADMINISTRATIVE REMEDY.

Counsel for Petitioners has intimated that Audubon Park and its residents and landowners will be totally without remedy if the District Court's judgment is affirmed. This is patently false. While we do not believe any recovery can be had, nevertheless it is true that the City and its landowners may litigate fully the "taking" issue by bringing appropriate action for damages against proper parties in a proper court. It is also true that under the FAA regulations they have an administrative remedy.

Pursuant to 14 CFR § 11.75 (R. App. 16b), "any interested person may petition to revoke or modify any rule or order . . ." of the FAA pertaining to use of the navigable airspace. This remedy Audubon Park must exhaust before complaining to the Courts.

After invoking its right to petition the FAA, if Audubon Park were to feel itself aggrieved by the action taken by the FAA, a review of that action by the courts is authorized by 49 USC § 1486.

Thus, both Audubon Park and its landowners have full and complete remedies they may pursue. These remedies have not been exhausted.

C.

It Is Inappropriate for the Court to Render an Advisory Opinion to Audubon Park as to Powers of Its Board of Trustees Relative to Enactment of Future Ordinances.

By Paragraph (2) of the Counter Declaration Petitioners say to this Court: If the Ordinance we enacted is not valid, what kind of ordinance can we enact in the future? A declaration of rights is sought in advance as to whether future legislation, if adopted, would be valid.

This certainly is not a justiciable issue.

Courts will not render advisory opinions. In *Chicago & S Air Lines* vs *Waterman S. S. Corp.*, 333 U. S. 103 at 113, 68 S. Ct. 431, 92 L. Ed. 568 (1948), this Court stated:

> "This court early and wisely determined that it would not give advisory opinions even when asked by the Chief Executive."

Even where statutes have already been enacted, this Court has refused declaratory relief where no attempt had been made to apply the statute to those seeking

relief. In *International L. & W. Union* v. *Boyd,* 347 U. S. 222 at 223, 74 S. Ct. 447, 98 L. Ed. 650 (1954), the Court ruled:

> "Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function."

The District Judge rendered a complete declaration as to the Ordinance Audubon Park had adopted. It correctly refused to render an advisory opinion as to possible future ordinances.

D.

The District Court Appropriately Entered Summary Judgment.

The issue in this case is one of law; no facts are in dispute. The simple question is: May Audubon Park legislate in the field of navigable airspace when its legislation conflicts with FAA regulations?

Counsel for Petitioners contends "that the factual issues have not been even dimly developed" and therefore asserts that the issues in controversy were not "ripe" for determination (p. 7, Petition). On the contrary, the Respondents fully developed all of the material facts and counsel for Petitioners was afforded every opportunity to develop any facts that conceivably could have raised a genuine factual issue.

On February 16, 1968, notice was served on counsel for Petitioners that on February 27 the Airlines would

move for summary judgment in this action. All the allegations in the Complaint filed by Respondents had been verified by sworn affidavit. Additional affidavits were also delivered to Counsel for Petitioners on February 16.

An extensive hearing was held by the District Judge on February 27. The Court determined that a permanent injunction should be adjudged and directed counsel for the Airlines to prepare Findings of Fact and Conclusions of Law and to tender Judgment.

When such Findings of Fact and Conclusions of Law were tendered, Counsel for Petitioners filed objections thereto and the action was again set down for a hearing on May 29, 1968. After an extensive hearing on that date, the Court changed slightly the tendered Findings of Fact and Conclusions of Law and, based thereon, on April 1, 1968, entered Judgment.

During all of this period, Petitioners filed only an unsworn Answer and Counter Declaration and an unsworn Amendment to Answer and Counter Declaration. No counter-affidavits, exhibits, or other material were ever tendered to the Court by Petitioners. Thus, Audubon Park passed up every opportunity to join an issue of fact.

It must, therefore, be concluded—as indeed, it is obvious—that Audubon Park could not have raised a genuine issue of material fact.

Since no facts were in dispute, the District Court entered a summary judgment based on the record before it.

Rule 56(e) was amended in 1963, because the Third Circuit, contrary to all of the other Circuits, had adhered to the position that affidavits did not overcome well-pleaded allegations. That rule now reads:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. *If he does not so respond, summary judgment,* if appropriate, *shall be entered against him.*" (Emphasis added.)

In *Moore's Federal Practice,* the textwriter has the following to say:

> ". . . affidavits may be used to overcome pleading allegations. This had been the sound rule, even prior to the 1963 amendment to subdivision (e), *supra;* and that amendment settled the matter." 6 *Moore's Federal Practice* ¶ 56.11 [3] p. 2164.

Reliance is placed on *F.A.R. Liquidating Corporation* v. *Brownell,* 209 F. 2d 375 (1954). There the Court of Appeals for the Third Circuit stated that under the particular facts of that case, affidavits could not be used on summary judgment as the basis for deciding a fact issue. That case, however, was decided in 1954 before Rule 56(e) was amended, specifically authorizing reliance on affidavits.

None of the Petitioners' authorities can be relied upon when, as in our case, fully adequate facts are es-

tablished by uncontroverted affidavits which abundantly support the granting of a summary judgment. Especially is this true where no counter-affidavits of any nature were filed.

In the trial court Petitioners raised none of what are now termed "basic facts" on p. 9 of the Petition. It is certainly now inappropriate for them to attempt to rely on such "facts" not in the record. Nevertheless, let us examine the asserted "basic facts":

(a) "Actual height of flights" over Auduhon Park.

Is this a material fact? If the Ordinance is valid, then flights under 750 feet are violative of its provisions no matter what the actual height may be.

(b) "Noise involved."

But the issue of noise was not raised in the pleadings nor was there any attempt to establish the existence of noise by affidavit. Although it is common knowledge that noise emanates from jet aircraft, that fact does not affect the issue of whether a local ordinance is in conflict with federal law.

(c) (d) (e) (f) (g) (h) (j) Facts allegedly relative to smoke and gaseous fumes, the safety, health and general welfare of the inhabitants of Audubon Park and a suggestion of "protective measures" relative thereto.

In adopting regulations the FAA does not, indeed cannot, disregard the general welfare of persons or property on the ground. Once, however, the FAA has regulated the use of airspace over a particular city, can

that municipality, on a claimed adverse effect on the general welfare of its residents, enact legislation that conflicts with the federal law?

All of these questions are questions of law. Even if they could have been considered mixed questions of law and fact, Petitioners have foreclosed their right to rely on facts not established by some offer of a sworn statement on the record.

Viewed from every angle, the District Judge appropriately entered, and the Circuit Court appropriately approved, summary judgment.

CONCLUSION.

There is no genuine issue of material fact in this case. Summary judgment was patently a proper result.

It is elementary that Courts will not give advisory opinions relative to legislation not yet enacted.

There is no basis for Petitioners' efforts to introduce a "taking" issue in this case. The pleadings do not properly raise the issue. Neither the alleged "taker" nor the alleged "takees" are parties to this case.

Only one genuine issue exists in this controversy: Is the Ordinance of Audubon Park a valid one? It cannot be valid because:

(1) It conflicts with valid federal statutes and regulations.

(2) The Congress has preempted the regulation of navigable airspace and of air traffic therein.

(3) The Ordinance constitutes an unconstiutional burden on interstate commerce.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

WILSON W. WYATT,
WYATT, GRAFTON & SLOSS,
Marion E. Taylor Building,
Louisville, Kentucky 40202,
Counsel for Respondents

STUART E. LAMPE,
JAMES N. WILLIAMS, JR.,
Of Counsel.

July 2, 1969.